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No. 95-1599

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADŽIĆ,

*Petitioner*,

—vs.—

S. KADIC, JANE DOE I, and JANE DOE II, *et al.*,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF *AMICI CURIAE* PROFESSORS DAVID J. BEDERMAN, ERWIN CHEMERINSKY, WILLIAM DODGE, MARTHA FIELD, BURKE MARSHALL, JUDITH RESNIK, DAVID L. SHAPIRO, AND WILLIAM W. VAN ALSTYNE IN SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST

*Amici curiae* David J. Bederman, Erwin Chemerinsky, William Dodge, Martha Field, Burke Marshall, Judith Resnik, David L. Shapiro, and William W. Van Alstyne are professors of federal jurisdiction or international law who have followed developments under the Alien Tort Claims Act since the decision of the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). We file this brief with the consent of all parties.

While we do not hold uniform views about all aspects of the ATCA and the cases construing it, we believe that the federal courts have applied the statute in a rigorous manner that has yielded generally consistent results. In particular, we do not believe that the cases under the ATCA have disturbed the overall fabric of federal jurisdiction. As a consequence, we do not believe that the carefully reasoned decision of the Court of Appeals here, which is consistent with the rigorous approach of earlier decisions, warrants review, particularly given the prospect that the course of proceedings on plaintiffs' claims under the Torture Victim Protection Act will make it unnecessary to decide the ATCA issues petitioner raises. We therefore urge the Court to let the decision stand.

## STATEMENT OF THE CASE

Plaintiffs-respondents filed related actions in the United States District Court for the Southern District of New York. Alleging acts of genocide, war crimes, torture, extrajudicial killing, and other violations of fundamental human rights committed by forces in the former Yugoslavia under the command and control of petitioner Radovan Karadžić, Pet. App. 46, plaintiffs asserted claims, among others, under the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), and the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992),

reprinted at 28 U.S.C.A. § 1350 (West 1993) (note following) ("TVPA"). Petitioner was personally served with the summonses and complaints during two separate visits to New York City in early 1993. Pet. App. 49-50.

On May 10, 1993, petitioner moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process, and nonjusticiability. Pet. App. 46-47. On September 7, 1994, after receiving briefing on only the service and personal jurisdiction issues, the District Court granted petitioner's motion to dismiss for lack of subject matter jurisdiction on the ground that the Alien Tort Claims Act did not reach petitioner's acts because he was not an official of any recognized state. Pet. App. 58-59; 866 F. Supp. 734 (S.D.N.Y. 1994).

On October 13, 1995, the United States Court of Appeals for the Second Circuit reversed. Pet. App. 5; 70 F.3d 232 (2d Cir. 1995). The Court held that plaintiffs' allegations of genocide and war crimes stated violations of customary international law actionable under the ATCA regardless of petitioner's status as a state actor. Pet. App. 16-22. The Court also held that the customary international law offenses of torture and summary execution did include a state action requirement. Pet. App. 22-23. Accordingly, the Court of Appeals held, petitioner would be liable under the ATCA for acts of torture and summary execution without regard to state involvement to the extent those acts were committed in pursuit of genocide or war crimes, and liable under the statute on claims of torture and summary execution on proof of state action. Pet. App. 23.

The Court of Appeals next held that the customary international law of human rights applies to states without distinction between recognized and unrecognized states, and that as a result, plaintiffs' allegations entitled them to prove either that

petitioner's regime satisfied the criteria for a state, or that he acted under color of law of Yugoslavia. Pet. App. 25-26. Finally, the Court held that plaintiffs' allegations of torture and summary execution stated claims under the Torture Victim Protection Act, which would require them to prove, among other things, that petitioner acted with official authority or under color of law. Pet. App. 26-28.[1]

On January 6, 1996, with a brief opinion, the Court of Appeals denied a petition for rehearing. Pet. App. 44; 74 F.3d 377 (2d Cir. 1996). This petition for a writ of certiorari followed.

## ARGUMENT

Petitioner purports to present to this Court a series of broadly cast questions going to the foundation and scope of the ATCA. Pet. i-ii. Petitioner's sweeping language boils down, however, to two basic assertions: first, that the decision below fundamentally conflicts with other federal courts' treatment of the statute; and second, that the decision gives the statute unprecedented and unjustifiable reach.

As an initial matter, even if the decision below presented questions under the ATCA that in other circumstances might

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[1] Although the District Court had ruled only on subject matter jurisdiction, the parties also briefed issues of service, personal jurisdiction, and justiciability under the political question doctrine. The Court of Appeals held that (a) personal service on petitioner outside of the U.N. headquarters district effectively subjected him to personal jurisdiction by the District Court, Pet. App. 30; (b) petitioner could not claim immunity under either the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted* at 22 U.S.C. § 287 note (1988), or federal common law, Pet. App. 31-34; and (c) the "politically charged context" in which the cases arose did "not transform them into cases involving nonjusticiable political questions," Pet. App. 35-39. *Amici* do not address any of these holdings, except to note that none appears to warrant this Court's review.

warrant this Court's review, the Court should deny the petition here. The multiple claims asserted by plaintiffs and the alternative basis of jurisdiction and liability provided by the TVPA make this case particularly unsuited for review at this early, pretrial stage, as the course of proceedings may well eliminate each of the issues under the ATCA petitioner asks this Court to decide.

In any event, neither of petitioner's basic assertions has merit. *First*, the federal courts have interpreted the ATCA in a consistent, restrained manner, and Congress endorsed their approach when it enacted the TVPA in 1992. Indeed, it appears that petitioner himself did not contest in the Court of Appeals many of the issues he seeks to raise now. On the principal issue addressed by the Court of Appeals -- state action as a component of various offenses under the customary international law of human rights – petitioner can point to no divergence of views warranting this Court's intervention. *Second*, the reading given these statutes by the Court of Appeals below and other federal courts does not render these statutes anomalous exercises of federal jurisdiction. To the contrary, these laws comport with a wide variety of other federal statutes by which Congress has exercised its authority, consistent with international law, to prescribe and adjudicate conduct occurring abroad.

## I.

## PLAINTIFFS' ALTERNATIVE RELIANCE ON THE TVPA MAKES REVIEW OF THIS CASE AT THIS STAGE PREMATURE.

First and foremost, the petition should be denied because, in light of the plaintiffs' alternative reliance on the TVPA and the unchallenged holdings of the Court of Appeals as to state action, the future course of proceedings could easily render moot each of the ATCA issues petitioner raises.

*First*, the TVPA and 28 U.S.C. § 1331 provide an undisputed basis of jurisdiction on which plaintiffs' entire case may go forward. It is undisputed that section 1331 confers federal jurisdiction over an action under the TVPA. *E.g.*, Pet. App. 28. It is also undisputed that the TVPA provides a federal cause of action against any individual who "under actual or apparent authority, or under color of law of any foreign nation" commits torture or extrajudicial killing. TVPA § 2(a). Giving full effect to the statutory requirement, the Court of Appeals held that plaintiffs here would need to show state action in order to prevail on their claims of torture and extrajudicial killing, Pet. App. 22-23, a result with which petitioner obviously does not take issue.

The Court of Appeals also explained how plaintiffs might meet the state action requirement. Pet. App. 24-26. It first set forth the showing plaintiffs would need to make in order to prove that the Republic of Srpska qualified as an unrecognized, de facto state under international law. *Id.* 24-26. Petitioner raises no issue as to that portion of the Court's analysis. The Court of Appeals then explained that, alternatively, plaintiffs could show that petitioner acted "under color of law" by acting in concert with state officials of Yugoslavia. *Id.* 26. In finding instructive the "color of law" requirement of 42 U.S.C. § 1983, the Court of Appeals adopted the same standard that petitioner urges here. *Compare* Pet. App. 26 (citing § 1983 and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)), *with* Pet. 12 (citing § 1983 and *NCAA v. Tarkanian*, 488 U.S. 179 (1988)).

Hence, at this point, there is no dispute that plaintiffs have stated a claim under the TVPA for which section 1331 provides jurisdiction. In light of that uncontested basis of jurisdiction, plaintiffs should also be permitted, under principles of supplemental jurisdiction, 28 U.S.C. § 1367, and without regard to the ATCA, to pursue any other causes of action properly arising under either international law or the applicable municipal law of tort.

*Second*, because the District Court dismissed these actions on the pleadings, plaintiffs have had no opportunity to prove either that the entity of which petitioner is an official qualifies as a state, or that petitioner acted under color of law of Yugoslavia, which clearly qualifies as a state. Should plaintiffs show state action by either of these routes in accord with the standards set forth by the Court of Appeals, they will be able to pursue their claims of torture and extrajudicial killing. As the Court of Appeals noted, the conduct alleged to constitute genocide and war crimes may also qualify as torture and extrajudicial killing, Pet. App. 23, particularly where, as here, plaintiffs allege that petitioner and his forces used acts of rape, forced impregnation, physical abuse, and murder to pursue their genocidal campaign. Hence, plaintiffs may be able to prove liability for the wrongful acts alleged without relying on their claims of genocide and war crimes, which would render moot petitioner's argument that those offenses include a state action component.

In order to ensure the informed consideration of issues that a full record facilitates, this Court generally refrains from reviewing decisions arising at an early, pretrial stage. This sound policy applies with special force in this case, where the development of a full evidentiary record on plaintiffs' several claims would so clearly sharpen and possibly eliminate the issues petitioner attempts to raise.

*Third*, the pattern of multiple claims and alternative bases of jurisdiction presented here may well prove characteristic of international human rights cases in the post-TVPA era. *See Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996). Thus, the same factors counseling denial here will likely diminish the significance of ATCA issues in other cases.

In short, review at this stage could easily have no effect on the actual outcome in this case and little or no effect in others. That prospect alone warrants denying the petition.

## II.

## PETITIONER HAS IDENTIFIED NO ISSUE UNDER THE ATCA WARRANTING REVIEW.

Petitioner raises no issue concerning the ATCA that warrants a grant of certiorari in this case. As an initial matter, the case plainly does not provide a suitable vehicle to decide the several issues concerning the ATCA that petitioner did not properly raise in the Court of Appeals but nevertheless seeks to present here. Given the consistent approach taken by the federal courts to claims under the statute for international human rights violations, and Congress's endorsement of that approach, there would be no reason for the Court to review any of those issues even had petitioner properly raised them. On the one substantive issue addressed below -- whether state action is a component of genocide and war crimes -- the decision of the Court of Appeals is in complete accord with other federal courts, the views of the United States, and authoritative international law sources.

### A. The Federal Courts Have Consistently Applied the ATCA.

The ATCA was enacted by the First Congress as part of the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (1993)). It provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

*Id.* While the ATCA has generated a substantial amount of historical investigation[2] and academic commentary, [3]the federal courts have had little, if any, difficulty actually applying it to allegations, like those here, of violations of human rights norms recognized as fundamental under international law.

*First*, the three Courts of Appeals that have now addressed the issue have each held that the ATCA both confers jurisdiction and recognizes a right to sue by private parties alleging international human rights violations. Pet. App. 9-10; *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474-75 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1996).[4] Indeed, petitioner conceded in the Court of

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[2] *Compare* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221 (1996) (historical origins support liberal construction of ATCA), *and* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467 (1986) (same), *with* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995) (historical origins support restrictive interpretation).

[3] *E.g.*, Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 Yale J. Int'l L. 65 (1995); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989).

[4] *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776-77 (D.C. Cir. 1985) (Edwards, J., concurring); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v.Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) ("*Forti I*"); 26 Op. Att'y Gen. 250, 252 (1907) (ATCA "provide[s] a right of action and a forum" for private tort suit over treaty violation); 1 Op. Att'y Gen. 57, 59 (1795) (victims of piracy "have a remedy by civil suit in the courts of the United States; jurisdiction being expressly given to these courts" by the ATCA).

Appeals that the ATCA provides a cause of action, advising the Court of Appeals that "Congress directly addressed the matter of civil remedies and created two express causes of action . . . under both § 1350 and the TVPA." Appellee's Brief (March 17, 1995) 27.[5]

Congress erased all doubt about the effect of the ATCA to authorize suit when it enacted the Torture Victim Protection Act of 1991, which codifies the cause of action by aliens for official torture or extrajudicial killing and extends the right to sue to citizens. Both the House and Senate Reports expressly evince Congress's understanding that a "remedy" for such offenses was "already available" to aliens under the ATCA. H. REP. NO. 367 (I), 102D CONG., 1ST SESS. 1991, 1992 U.S.C.C.A.N. 84, 86

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[5] Then-Judge Bork took a contrary view in his 1984 concurrence in *Tel-Oren*. While he acknowledged that the ATCA might be read to reflect "Congress' recognition (as opposed to creation)" of a right to sue, 726 F.2d at 811, he ultimately concluded that suit would lie only if international law both set forth the substantive norm and provided the procedural vehicle for its vindication. *Id.* at 816. Judge Bork did not attempt to square that position with his acknowledgment that the Congress that enacted the ATCA did intend to authorize suit for at least certain law-of-nations offenses, including violations of safe-conducts, the rights of ambassadors, and the laws of piracy, *id.* at 813-14; nor did he identify the sources of international law that, in his view, provided a cause of action for such violations, *compare id.* at 813-16 & nn. 22-23 *with id.* at 778-79 (Edwards, J., concurring). Apart from the district court decision in *Tel-Oren*, which did not command a majority in the Court of Appeals for the ground of its judgment, the only other reported decisions suggesting a view consistent with Judge Bork's are two district court decisions granting motions to dismiss on the ground that plaintiff was not an alien, but then pointing to the purported absence of a cause of action as, at best, an alternative holding, in discussions that confuse the relevance of the issue. *See Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 347 (S.D. Tex. 1989) (relying on *Filartiga* to identify conduct actionable under ATCA); *Tannenbaum v. Rabin*, No. CV-95-4537, 1996 WL 75283, at * 5 (E.D.N.Y. Feb. 13, 1996) (apparently relying on district court decision in *Tel-Oren* as support for dismissal for lack of alienage).

(Nov. 25, 1991) (hereinafter HOUSE REPORT ); S. REP. NO. 249, 102D CONG., 1ST SESS., 1991 WL 258662 (Leg. Hist.) at 4 (Nov. 26, 1991) (hereinafter SENATE REPORT). Further, the legislative history emphasizes that the ATCA "should *remain* intact to *permit suits* based on other norms that already exist or may ripen in the future into rules of customary international law." HOUSE REPORT at 86 (emphasis added); *see also* SENATE REPORT 1991 WL 258662 at 4-5.

The explicit views of a subsequent Congress as to the enactments of an earlier one are entitled to significant weight, particularly where, as petitioner suggests is the case here, the intent of the enacting Congress is hard to discern. *See, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Congress's express confirmation that the ATCA provides a civil "remedy" by " permit[ting] suits" based on substantive international law norms provides additional reason to respect the federal courts' identical conclusion.

*Second*, the courts applying the ATCA have allowed its express language to determine its scope. Specifically, as Congress directed, the statute has been limited to suits by aliens. At the same time, the federal courts have refused invitations, such as petitioner's here, Pet. 17, to read into the statute territorial restrictions that Congress did not impose. *See, e.g., Trajano v. Marcos*, 978 F.2d 493, 500 (9th Cir. 1992), *cert. denied* 508 U.S. 972 (1993); *Paul*, 812 F. Supp. at 211.

*Third*, courts applying the ATCA have agreed that customary international law provides the substantive norms of conduct defining the tort. *See, e.g., Hilao*, 25 F.3d at 1475; *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425-26 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir.

1980); *Xuncax*, 886 F. Supp. at 184-85; *see also Tel-Oren*, 726 F.2d at 781-82 (Edwards, J., concurring); *id.* at 820-21 (Bork, J., concurring). It follows that a court must apply the customary international law that governed the defendant's conduct at the time the defendant acted. *See Filartiga*, 630 F.2d at 881. A court could hardly do otherwise, as customary international law is, by definition, an evolving body of law. *The Paquete Habana*, 175 U.S. 677, 694 (1900). Moreover, Congress has expressly endorsed that approach. HOUSE REPORT at 86 (ATCA "should remain intact to permit suits based on other norms that already exist *or may ripen in the future into rules of customary international law*") (emphasis added)).

*Fourth*, the federal courts have been rigorous in limiting the ATCA's reach to "specific, universal and obligatory" norms of customary international law of human rights. *Hilao*, 25 F.3d at 1475; *see* Pet. App. 10 (ATCA reaches only conduct that violates "well-established, universally recognized norms of international law" (citation omitted)); *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring). Specifically, federal courts have held that crimes such as official torture, summary execution, causing the disappearance of persons taken into custody, and prolonged arbitrary detentions are actionable under the statute, while free speech violations, negligence, and fraud are not.[6] No court has

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[6] *Compare Abebe-Jira*, 72 F.3d 844 (official torture and cruel, inhuman, and degrading treatment actionable); *Hilao*, 25 F.3d at 1475 (official torture, summary execution, and disappearance of arrestees actionable); *Filartiga*, 630 F.2d at 884-85 (official torture actionable); *Mushikiwabo v. Barayagwiza*, 1996 WL 164496, at *2 (genocide, torture, and summary execution actionable); *Xuncax*, 886 F. Supp. at 184-87 (torture, summary execution, disappearance, arbitrary detention, and certain cruel, inhuman, and degrading treatment actionable); *Paul*, 812 F. Supp. at 211-12 (torture and arbitrary detention actionable); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709-10 (N.D. Cal. 1988) (continued...)

ever suggested that the offenses alleged here -- genocide, torture, war crimes, and crimes against humanity -- do not fall within the scope of the ATCA. *See, e.g., Mushikiwabo v. Barayagwiza*, 1996 WL 164496, at *2 (genocide actionable).[7]

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[6] (...continued)
("*Forti II*") (disappearance actionable); *Forti I*, 672 F. Supp. at 1541-42 (torture, prolonged arbitrary detention, and summary execution actionable); *and Martinez-Baca v. Suarez-Mason*, No. 87-2057 (SC) (N.D. Cal. Apr. 22, 1988) (torture, prolonged arbitrary detention, and cruel, inhuman and degrading treatment actionable), *with Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (fraud, breach of fiduciary duty, or misappropriation of funds not actionable) *cert. denied*, 116 S. Ct. 709 (1996); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670-71 (S.D.N.Y. 1991) (shipping hazardous wastes not actionable); *and Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (free speech violations not actionable).

[7] Petitioner waited until his petition for rehearing to raise any question about the decision in *Filartiga*, having discussed the case during the principal briefing only to support his argument that the ATCA should be limited to "non-state action." Appellee's Br. 18-19. When petitioner did challenge *Filartiga*, he relied on a recently published law review article to argue, as he does here, that Congress intended the statute to apply only to actions under the law of prize. *See* Pet. 14 (citing Sweeney, note 2 above); Petition for Rehearing (Nov. 15, 1995) 3. *But see* Dodge, note 2 above (criticizing Professor Sweeney's thesis as historically and legally unsound). It would be difficult, at a minimum, for a federal court to adopt Professor Sweeney's historical hypothesis in the face of the general rule that statutes be read to mean what they say, *e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); the consistent judicial interpretation of the statutory language, *e.g., Holder v. Hall*, 114 S. Ct. 2581, 2629 (1994) (separate opinion of Blackmun, Stevens, Souter, and Ginsburg, JJ.); and the endorsement of that interpretation by a subsequent Congress, *e.g., Seatrain Shipbuilding*, 444 U.S. at 596. In any event, a single law review article does not provide an occasion for granting certiorari, particularly when its thesis has not been adopted -- or, with the exception of the decision below on rehearing, as yet even considered -- by any lower court.

**B. The Federal Courts Are In Accord On The State Action Issues Petitioner Raises.**

Prior to the petition for rehearing, the sole ATCA-related ground on which petitioner sought to defend the District Court's judgment was his argument that the statute did not confer subject matter jurisdiction over claims based on "non-state action." Appellee's Br. 19; *see id.* 18-26. Hence, the Court of Appeals decided two questions as to the scope of the Alien Tort Act:

> whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; [and,] if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action.

Pet. App. 5. The Court of Appeals answered both questions affirmatively, Pet. App. 16-22, and then set forth the standards by which plaintiffs-respondents might establish state action as to those offenses, such as torture and summary execution, that require it, *id.* at 22-26. None of these rulings merits review by this Court.

Courts applying the ATCA have uniformly recognized that certain acts, such as torture, murder, prolonged arbitrary detention, and causing a person's disappearance, do not implicate the law of nations absent official sanction, sponsorship, or involvement. *E.g., Trajano*, 978 F.2d at 500 (torture); *Sanchez-Espinoza*, 770 F.2d at 205-07 (torture and summary execution, among others); *Filartiga*, 630 F.2d at 889 (torture); *Xuncax*, 886 F. Supp. at 184-85 (torture, summary execution, disappearance, and arbitrary detention); *Forti II*, 694 F. Supp. at 709-11 (disappearance); *Forti I*, 672 F. Supp. at 1541-42 (torture, murder, and prolonged arbitrary detention); *see also Tel-Oren*, 726 F.2d at 794-95 (Edwards, J., concurring) (torture). Relevant international law authorities are to the same effect. *See, e.g.*, Convention

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, SENATE TREATY DOC. No. 20, 100th Cong., 2d Sess., 23 I.L.M. 1027 (1984), 24 I.L.M. 535 (1985) (requiring that pain or suffering be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" in order to constitute violation). In accord with these authorities, the Court of Appeals held that plaintiffs' claims of torture and summary execution required a showing of state action. Pet. App. 22-23; *see* Part I above.

The authorities are equally consistent, however, in recognizing that other norms of customary international law apply to individuals as private persons, without regard to state involvement. As the United States advised the Court of Appeals, "non-state actors may be responsible for violations of international humanitarian law, depending upon the character of the individual claim." Statement of Interest of the United States (September 13, 1995) 6. Indeed, in *Sanchez-Espinoza*, the case upon which petitioner principally relies, the Court of Appeals for the District of Columbia Circuit expressly stated that certain "private, nongovernmental acts . . . are contrary to treaty or the law of nations -- the most prominent examples being piracy and assaults upon ambassadors." 770 F.2d at 206. *See also Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring) (piracy and slave trading).

The Court of Appeals held here that genocide and certain war crimes are among the law-of-nations offenses reached by the ATCA that do not require a showing of state action. Pet. App. 16-22. Aside from the District Court below, no court has held to the contrary. The holding of the Court of Appeals comports with the views of the United States, which unequivocally stated to the Court of Appeals that "the law of nations can indeed be violated by non-state acts of genocide, war crimes, and crimes against humanity." U.S. Statement of Interest 14. It also comports with

authoritative international law sources. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, art. IV, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, *entered into force* for United States Feb. 23, 1989 ("Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"); Pet. App. 20-21 & n.7 (common article 3 of Geneva Conventions). Petitioner cites no authority of any kind to the contrary.

Finally, in light of its holding that plaintiffs would need to show state action to prevail on their claims of torture and summary execution, the Court of Appeals explained how that requirement might be met. Pet. App. 24-26. Petitioner does not take issue with the standards laid down by the Court of Appeals. *See* Part I above.

In short, as to both the applicability and content of the state action requirement under customary international law, the holdings of the Court of Appeals below comport with other federal decisions, the views of the United States, and authoritative international law sources. There is no reason for this Court to review those holdings.

## III.

### THE ATCA AND ITS APPLICATION BELOW COMPORT WITH ESTABLISHED PRINCIPLES OF FEDERAL JURISDICTION.

Contrary to Petitioner's contention, Pet. 16, the holding of the Court of Appeals that the ATCA applies to conduct committed beyond U.S. borders by a private citizen of a foreign state is neither "unprecedented" nor "breathtaking." The ATCA follows a long line of statutes that apply to conduct and persons beyond this country's borders. Against this background, the application of the ATCA to the conduct at issue here is fully consistent with accepted principles of federal jurisdiction and international law.

From the earliest days of the Republic, Congress has used U.S. law, both civil and criminal, to regulate persons and conduct beyond U.S. borders. As early as 1790, Congress used criminal sanctions to punish piracy on the high seas, regardless of the nationality of the perpetrator or the victim. Law of April 30, 1790, ch. 9, § 8, 1 Stat. 112 (1790) (criminalizing piracy on the high seas) (presently codified at 18 U.S.C. § 1651); *see also United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (applying 1819 criminal prohibition against piracy). Congress has also provided criminal remedies for torture, hostage taking, aircraft piracy, certain transactions involving nuclear materials, and the murder of diplomats, regardless of the place of the crime or the nationality of the victim or the perpetrator.[8]

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[8] *See* 18 U.S.C. § 2340A(b)(2) (torture); 18 U.S.C. § 1203(b)(1)(B) (hostage taking); 18 U.S.C. § 1116(c) (murder of foreign officials and diplomats); 18 U.S.C. § 831(c)(3) (prohibited transactions involving nuclear materials); 49 U.S.C. § 46502(b)(1) (aircraft piracy); *cf.* 18 U.S.C. § 2332 (international terrorism where U.S. national is killed).

Civil remedies for extraterritorial wrongs also have long been part of federal law. In 1819, Congress provided for civil seizure of ships used for piracy, without regard to the nationality of the victim or the pirate. Law of March 3, 1819, ch. 77, § 4, 3 Stat. 510, continued in force by Law of May 15, 1820, ch. 113, § 1, 3 Stat. 600; *see also The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (interpreting 1819 statute providing for civil seizure of ships used for piracy). Recently, in the Torture Victim Protection Act, Congress provided both alien and citizen victims of torture with a civil cause of action for damages against their torturers regardless of the nationality of the torturer or the place where the torture occurred. Pub. L. No. 102-256, 106 Stat. 73 (1992); *cf.* 18 U.S.C. § 2333(a) (providing private right of action for treble damages to U.S. nationals injured as a result of international terrorism anywhere in the world).

In the realm of economic regulation, Congress has extended the reach of U.S. antitrust and securities laws to conduct engaged in abroad by foreign persons and entities. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 415, 416 (1987) (hereinafter "RESTATEMENT"). This Court and the courts of appeals have consistently upheld these assertions of extraterritorial jurisdiction. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (applying U.S. antitrust law to conduct abroad by foreign reinsurers); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (applying U.S. antitrust law to conduct abroad by foreign electronics manufacturers); *Itoba Ltd. v. Lep Group Plc.*, 54 F.3d 118 (2nd Cir. 1995), *cert. denied*, 116 S.Ct. 702 (1996) (applying U.S. securities laws to conduct abroad by British share-purchaser); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2nd Cir. 1972) (same). Indeed, it was "settled law" as early as 1945 "that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has

consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2nd Cir. 1945) (L. Hand, J.).

It is a well-established principle of international law that all States have universal jurisdiction to provide criminal and civil redress for extraterritorial conduct that violates fundamental norms of the law of nations, such as genocide, piracy and torture. *See United States v. Yunis*, 924 F.2d 1086, 1091-92 (D.C. Cir. 1991) (invoking universal jurisdiction over air piracy); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (invoking universal jurisdiction in extraditing suspected Nazi war criminal to Israel). For example, numerous international treaties recognize universal jurisdiction over the offenses defined by their terms.[9] Such universal jurisdiction over grave breaches of human rights and other international crimes reflects the status of such offenses as wrongs against the entire international community for which any state may pursue a remedy. *In re Barcelona Traction, Light and Power Company* (Belgium v. Spain), 1970 I.C.J. Rep. 3, 33 ("In view of the importance of the rights involved, all states can be held to have

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[9] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5(2), Dec. 10, 1984, SENATE TREATY DOC. No. 20, 100th Cong., 2d Sess., 23 I.L.M. 1027 (1984), 24 I.L.M. 535 (1985); Convention Against the Taking of Hostages, art. 5(2), T.I.A.S. 11081 (1985); Convention for the Protection and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, art. 3(2), 28 U.S.T. 1975, T.I.A.S. 8532 (1977); Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4(2), 22 U.S.T. 1641, T.I.A.S. 7192 (1971).

a legal interest in their protection"); RESTATEMENT § 404.[10]

In the context of this substantial body of law, the Courts of Appeals for each of the Second, Ninth, and Eleventh Circuits have interpreted the ATCA as one more means by which Congress has sought to remedy violations of the rule of law. There is no need for this Court to examine their conclusion that the ATCA reaches extraterritorial conduct that violates the most fundamental norms of international law.

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[10] In practice, federal courts have interpreted and given effect to international law in a wide variety of contexts, both procedural and substantive. For example, issues of foreign sovereignty have been addressed in cases involving the Foreign Sovereign Immunities Act, *see Argentine Republic v. Amerada-Hess Shipping Corp.*, 488 U.S. 428 (1989), and the Act of State Doctrine, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). International procedural issues have been considered in the context of the service of judicial documents abroad, *see FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980); *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); obtaining evidence in a foreign state, *see Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522 (1987); and enforcing foreign judgments, *see Hilton v. Guyot*, 159 U.S. 113 (1895). This Court has explicitly addressed the broader issues of statutory construction in light of international law standards, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and comity, *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). Substantive issues of international law have been addressed in the context of the acquisition and control of territory, *Jones v. U.S.*, 137 U.S. 202 (1890); the resolution of boundary disputes, *Iowa v. Illinois*, 147 U.S. 1 (1893); *Arkansas v. Tennessee*, 246 U.S. 158 (1918); questions of nationality, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); principles of war and neutrality and their effect on private rights, *The Steamship Appam*, 243 U.S. 124 (1917); *Dow v. Johnson*, 100 U.S. 158 (1879); and private property rights generally, *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

## CONCLUSION

The Court should deny the petition for a writ of certiorari.

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